

# Commentary

## A Gentlemen's Agreement: The Impact Of Honorable Engagement Clauses In U.S. And English Reinsurance Agreements And Arbitration Today

By  
**Stephanie T. Dunn**  
**Todd Corey**  
and  
**Leah M. Quadrino**

*[Editor's Note: Stephanie T. Dunn is a senior associate in Steptoe & Johnson LLP's Washington, D.C. office, whose practice focuses on reinsurance disputes and other complex insurance and reinsurance matters. Todd Corey is an assistant solicitor in Steptoe & Johnson's London office focusing on worldwide arbitration and dispute resolution. Leah M. Quadrino is also an associate in Steptoe & Johnson's Washington office whose practice concentrates in complex reinsurance and insurance dispute resolution. Copyright 2006 by the authors. Replies are welcome.]*

As industry practitioners are well aware, the world of reinsurance is steeped in tradition. While the term "gentlemen's agreement" no longer resonates in most industries, its impact on the reinsurance community is still felt today. The phrase refers to an "unenforceable and usually oral agreement that depends merely on the good faith of the parties."<sup>1</sup> In reinsurance, the principle of an honorable, or gentlemen's, agreement once marked the cornerstone of an ongoing professional relationship where those responsible for binding the risk were also often involved if a dispute later arose. This ongoing relationship fostered a desire for the parties to resolve their disputes by more civilized and private means, including arbitration.

Reinsurance agreements have historically incorporated the concept of being bound in honor by the use of an "honorable engagement" clause. Although the clause indicates that the parties have reduced their agreement to writing, and thus expect to have

a legally binding contract in place, the general purpose is to relieve arbitrators from a duty to resolve a reinsurance dispute according to strict principles of law and to allow a somewhat broader approach by applying notions of fairness, equity and commercial practice. While reinsurance agreements in both England and the United States commonly include an honorable engagement clause, courts in both countries interpret the clause differently, in part due to separate arbitration acts governing those jurisdictions, as well as variations in the actual wording of the clause as found in English and U.S. reinsurance agreements.

This article explores the interpretation of the honorable engagement clause in both the United States and England. It addresses the history of the clause, the arbitration acts of England and the U.S., and the manner in which courts in each jurisdiction have interpreted the clause in light of their respective statutory frameworks. Finally, it considers how the different judicial interpretations in England and the U.S. impact the way in which arbitrations are conducted.

### I. Historical Roots Of The Honorable Engagement Clause

Arbitration clauses first appeared in reinsurance contracts in Europe in the early 19th Century.<sup>2</sup> While it is unclear exactly when those clauses first described the arbitration proceeding as an "honorable engagement," one treaty between a French

and an Italian reinsurance company, dating from June 29, 1850, captured the essence of that phrase by stating that the “arbitrators were empowered to dispense with all judicial formalities and could abstain from following the strict rules of law.”<sup>3</sup> This clause was particularly groundbreaking in 1850, as the English Common Law Procedure Act of 1854 (the “1854 Act”) (which introduced a structure for judicial control of arbitration proceedings) had not yet been passed, and treaty reinsurance arbitration clauses had only previously existed in certain German treaties.<sup>4</sup>

Such clauses are now commonly found in both English and U.S. reinsurance treaties. Historically, the honorable engagement clauses used in England and the U.S. were substantially similar and provided as follows:

The arbitrators shall interpret this Agreement as an honorable engagement and not as merely a legal obligation. They are relieved of all judicial formalities and may abstain from following the strict rules of law. They shall make their award with a view to effecting the general purpose of this Agreement in a reasonable manner rather than in accordance with a literal interpretation of the language.<sup>5</sup>

Thus, the underlying principles of an honorable engagement clause — relief from judicial formalities and abstention from the strict rules of law — have existed since at least the mid-nineteenth century.

Over time, however, differences in the language used in reinsurance agreements and in its interpretation by courts have emerged. Recent English cases have addressed honorable engagement clauses which do not contain the language relieving arbitrators from following the strict rules of law, as English courts have determined that such language can void an arbitration clause. In U.S. reinsurance treaties, however, variations of that original form remain in use. The divergent paths taken by English and U.S. courts in their interpretation of the typical honorable engagement clause appears to be grounded, at least in part, in the varying degree of judicial review over the arbitration process and the grounds on which an appeal can be made.

## II. England: The Arbitration Acts And Judicial Interpretation Of The Honorable Engagement Clause

The degree of judicial oversight of English arbitrations has not been static. In fact, it appears to have narrowed over the years, as arbitration acts have sought to limit by statute the extent to which judicial review is available, especially where an arbitration agreement contains an honorable engagement clause. Even so, the degree of judicial oversight over English arbitrations is broader than in the U.S. The broader level of scrutiny granted to English courts under common law, along with arbitrators’ established practice of providing reasons for their award, have allowed the courts to construe the traditional honorable engagement clause more narrowly than their counterparts in the United States.

### A. English Arbitration Acts

English arbitration legislation dates back to the Arbitration Act of 1698. From the early-nineteenth century until relatively recent times, English law recognized two means of judicial review of arbitration awards for an error of law: the first involved judicial review for an error of law on the face of the award, and the second involved judicial review through a special case procedure.<sup>6</sup>

In 1802, English courts claimed the right to interfere with an arbitration award for error of law on the face of the award; up to that point, the decisions of arbitrators on questions of law had been conclusive, barring fraud or a similar allegation.<sup>7</sup> This basis for judicial oversight was eventually thought to be arbitrary as to whether an error appeared on the face of the award.<sup>8</sup> The wide degree of judicial oversight was unpopular with arbitrators and led to the practice of arbitrators detailing their reasons for the award, hoping to avoid judicial review; however, the reasons were stated in a separate, confidential document which prevented them from being shared with a court for the purpose of a substantive appeal.<sup>9</sup>

The second basis for judicial review of errors of law was in the form of a special case procedure, which empowered arbitrators to state a case on a point of law for the court’s opinion.<sup>10</sup> While grounded in common law, the special case procedure was given limited recognition in the 1854 Act and subsequently codified in the Arbitration Act of 1950 (the “1950 Act”)

at section 21. Section 21 provided that, following a party's request, an arbitrator or umpire could state an award (or part thereof) in the form of a special case for the consideration by the High Court; and if an arbitrator refused to state a case, then the High Court could order him to do so.<sup>11</sup> Courts upheld the right to state a special case, based on the theory that:

Arbitrators, unless expressly authorized, have to apply the laws of England. When they are persons untrained in law, and especially when as in this case they allow persons trained in the law to address them on legal points, there is every probability of their going wrong, and for that reason Parliament has provided in the Arbitration Act that, not only may they ask the Courts for guidance and the solution of their legal problems in special cases . . . but that the Courts may require them, even if unwilling, to state cases for the opinion of the Court on the application of [a] party to the arbitration if the Courts think it proper.<sup>12</sup>

The Arbitration Act of 1979 (the "1979 Act"), however, changed judicial review of arbitrations by abolishing the general power of review for error of law on both the face of the award and by means of a special case procedure. It was believed that the primary purpose of arbitration (namely, an efficient and final award by a chosen decision-maker) was effectively thwarted by excessive judicial intervention. As such, the 1979 Act introduced limited powers of judicial review for an error of law.<sup>13</sup> An appeal could not be maintained unless there were sufficient reasons in the award to enable the court to identify an error of law.<sup>14</sup> If sufficient grounds were not stated, the court was permitted to order the arbitrators to give sufficient reasons for the award.<sup>15</sup> Following the 1979 Act, there was a series of cases where the courts resisted the opportunity to expand the scope of judicial review of arbitration awards.<sup>16</sup>

The Arbitration Act of 1996 (the "1996 Act") is currently in effect and relates to arbitration agreements entered into after January 31, 1997. Unlike its predecessors, the 1996 Act requires that arbitrators give reasoned awards, irrespective of rights of appeal.<sup>17</sup> It also retains the limited right of appeal for error of

law<sup>18</sup> and provides, separate from the right to appeal, that an award may be challenged for serious irregularity, including:

- where the tribunal exceeded its powers;
- where the proceedings were not conducted in the manner agreed to by the parties;
- where the effect of the award is uncertain or ambiguous;
- where the award was obtained by fraud, or
- where the award (or the way in which it was procured) was contrary to public policy; or
- where the award fails to comply with requirements as to its form.<sup>19</sup>

As a result of the changes in the 1996 Act, English courts no longer maintain as broad a supervisory role over arbitrations as they once did; they are instead confined to their statutory powers.<sup>20</sup> Despite the narrowing of the supervisory role of the English courts, the right of judicial review still appears to be broader than that seen in the U.S.

The 1996 Act (section 46(1)(b)) is the first of the English arbitration acts to reference the use of an honorable engagement clause by providing that:

- (1) The arbitral tribunal shall decide the dispute
  - (a) \*\*\*
  - (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.<sup>21</sup>

It was recently held "[t]hat section [46(1)(b)] was intended to validate 'honorable engagement' and similar clauses often used in contracts containing arbitration clauses . . ." <sup>22</sup> However, it is less clear whether section 46(1)(b) is simply a codification of the common law rule regarding the scope of the honorable engagement clause or a change in the position. The comparatively broad grounds for appeal which have traditionally existed in English common law,

coupled with the practice of arbitrators providing reasons for their award, have provided the courts with a basis for narrowly applying the traditional honorable engagement clause.

### B. Interpretation Of The Honorable Engagement Clause By The Courts In England

The application of English law to the honorable engagement clause has historically focused on whether the clause is valid and if so, the scope of authority it grants to the arbitrators. As mentioned above, the issue of whether the clause is valid appears to have been settled by section 46(1)(b) of the 1996 Act, but the scope of the clause remains an issue.

Historically, two categories of honorable engagement clauses have existed in English reinsurance contracts: those that are broadly construed to authorize the arbitrator to interpret the reinsurance treaty as an honorable engagement and to disregard the strict rules of law, and those that are narrowly construed to authorize the arbitrator to disregard only the strict rules of construction of the words used.

A typical clause which is given a broad construction provides that:

The arbitrators and umpire are relieved from all judicial formalities and may abstain from following the strict rules of law. They will settle any dispute under this agreement according to an equitable rather than a strictly legal interpretation of its terms.

The more narrowly construed clause generally provides that:

The Arbitrators and Umpire shall interpret this Reinsurance as an honourable engagement and they shall make their award with a view to effecting the general purpose of this Reinsurance in a reasonable manner, rather than in accordance with a literal interpretation of the language.<sup>23</sup>

While the two types of clauses appear similar on their face, the courts have drawn important distinctions

between the two. Agreements that contain the broadly drafted language (allowing arbitrators to do away with strict rules of law) run the risk of the court voiding the entire reinsurance agreement,<sup>24</sup> or at least the honorable engagement clause.<sup>25</sup> However, if the honorable engagement clause is found to be valid, the court must then determine the scope of the arbitrators' powers under the clause. In general, English courts favor the narrow construction, which requires an arbitrator to disregard technical or strict constructions of words (rather than to disregard the general law).<sup>26</sup> The narrow construction allows arbitrators to construe contract wording in light of the general purpose of the agreement.

In Home and Overseas Ins. Co. Ltd. v. Mentor Ins. Co. (UK) Ltd.,<sup>27</sup> the Court of Appeals gave detailed attention to the effect of an honorable engagement clause. The case involved a narrowly drafted honorable engagement clause where the Court of Appeals turned to the House of Lords' prior decision in Antaios Cia Naviera SA v. Salen Rederierna AB for guidance.<sup>28</sup> The court in Antaios, which involved construction of a contract clause, had previously confirmed that:

if detailed semantic and syntactical analysis of words in a commercial context is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.<sup>29</sup>

The clause at issue in Home did no more than give arbitrators the liberty to do that which was approved by the House of Lords in Antaios: to depart from literal or ordinary material meaning to give a construction that would not defeat the commercial purpose of the contract.<sup>30</sup> Based in part on the ruling in Antaios, the Home court accepted the position that an honorable engagement clause which purported to give freedom to arbitrators to decide disputes without regard to the law and instead according to their own notions of fairness, was invalid.<sup>31</sup>

Since passage of the 1996 Act, questions have arisen as to the validity and scope of the honorable engagement clause in light of section 46(1)(b). It at least appears clear that arbitrators may depart from a literal construction of words in order to meet the commercial purpose of the contract. However, section 46(1)(b) of the 1996 Act makes it less certain how the scope of the clause will be interpreted in the future.

### III. U.S. Arbitration Acts And The Honorable Engagement Clause

The U.S. legal framework governing arbitration,<sup>32</sup> principally the Federal Arbitration Act ("FAA"), has given teeth to the honorable engagement clause in U.S. arbitrations, thereby giving it much broader importance than English law provides. U.S. federal courts reviewing arbitration decisions in light of the FAA have routinely held that the honorable engagement clauses provide arbitration panels with broad authority to consider business practices of the reinsurance industry, choose not to apply a particular state's law, craft equitable remedies that capture the spirit of the business arrangement, and apply a business solution. As discussed below, these differences can have profound impacts on the arbitration process.

#### A. U.S. Federal Arbitration Act

Congress enacted a preliminary version of the FAA in 1925,<sup>33</sup> but the more detailed framework now located at 9 U.S.C. §§ 1 et seq. (2006) was enacted in 1947.<sup>34</sup> The statute governs federal court review of any arbitration award. "Congress' principal purpose [in passing the FAA was] ensuring that private arbitration agreements are enforced according to their terms . . . ."<sup>35</sup> The FAA embodies the general principle of freedom of contract, and the courts' corresponding ability to review arbitral awards is therefore "extremely narrow and exceedingly deferential."<sup>36</sup> The result of this extremely high standard is that "arbitral awards are nearly impervious to judicial oversight."<sup>37</sup>

Most commonly, a court will review an arbitration award based on a motion to vacate filed under § 10 of the FAA.<sup>38</sup> The generally recognized grounds for vacating an arbitral award are:

- where the award was procured by corruption, fraud, or undue means;
- where there was evident partiality or corruption in the arbitrators;
- where the arbitrators are guilty of misconduct in refusing to postpone the hearing (with sufficient cause shown) or hear evidence pertinent and material to the dispute, or any other misbehavior where the rights of a party have been prejudiced;
- where the panel exceeded its powers, or so imperfectly executed them that a final and definite award was not made; or
- where the award is in manifest disregard of the law.<sup>39</sup>

It is under §10, and the related motions to vacate, that federal courts have most often examined the impact of an honorable engagement clause on the arbitration process and resulting awards.

#### B. Interpretation Of The Honorable Engagement Clause By U.S. Courts

The Ninth and First Circuits are the most recent Courts of Appeals to examine the honorable engagement clause and its impact on the reinsurance arbitration process. In United States Life Ins. Co. v. Insurance Commissioner of the State of California,<sup>40</sup> U.S. Life appealed the district court decision<sup>41</sup> denying its petition to vacate an arbitral award that reformed the subject reinsurance treaty, which contained a typical honorable engagement clause.<sup>42</sup> U.S. Life had sought rescission of the treaty based on the cedent's alleged material nondisclosure. While the arbitration panel acknowledged that the "cedents should have acted in a more open and forthright manner," it did not grant the rescission requested, but reformed the treaty and reduced U.S. Life's reinsurance liabilities by 10 percent.<sup>43</sup> In response, U.S. Life asserted in both its motion to vacate and in its later appeal that the arbitration panel, by reforming the reinsurance treaty in the award, exceeded its power, acted in "manifest disregard of the law," was "completely irrational," and that the award was contrary to public policy.<sup>44</sup>

The Ninth Circuit reiterated the established principles that federal courts have "an extremely limited authority over arbitration proceedings" and "[n]either erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award."<sup>45</sup> The Ninth Circuit affirmed the lower court's findings and denied the motion to vacate, based in significant part on the honorable engagement clause in the reinsurance treaty, which read: "The Arbiters shall consider this contract as an honorable engagement rather than merely as a legal obligation and they are relieved of all judicial formalities and may abstain from following the strict rules of law."<sup>46</sup> The court noted that the reinsurance treaty's language establish-

ing it as “an honorable engagement” and granting the arbitrators the right to “abstain from following strict rules of law” provided “the arbitrators such wide latitude to resolve the disputes that when combined with our inability to vacate even erroneous legal conclusions in an arbitral award, we conclude that the arbitrators did not exhibit a manifest disregard of the law, and acted well within the powers granted to them under the contract.”<sup>47</sup>

While the recent U.S. Life case was an unpublished decision, the First Circuit took a similarly broad view of the impact of an honorable engagement clause on the arbitration process in National Casualty Co. v. First State Ins. Group, decided in December 2005.<sup>48</sup> In National Casualty, the court was asked to vacate an arbitration award based on “procedural deficiencies.” The underlying arbitration panel ordered First State to produce certain documents, which it had previously withheld on grounds of privilege, and indicated that if the documents were not produced, the panel “would draw whatever negative inferences it deemed appropriate.” First State remained unwilling to produce the documents, yet the panel still ruled against National Casualty and in favor of First State.<sup>49</sup>

In examining National Casualty’s motion to vacate, the court noted that its evaluation does not take place in a “vacuum,” but must be examined in light of the parties’ understanding of a “fair hearing” under the governing contract. The arbitration clause contained a traditional honorable engagement clause, which relieved the panel of all judicial formalities and the need to follow strict rules of law. The court found that the clause so fully signed over the power to “run the dispute resolution process unrestrained by strict rules of law or judicial process” that it would be very difficult to show a party’s rights were prejudiced and vacate the award.<sup>50</sup> Based in significant part on the broad powers granted to the arbitration panel in the honorable engagement clause, the court held that the panel’s remedy of drawing a negative inference against First State for failing to turn over the documents offset any unfairness to National Casualty from not receiving the materials for use at the hearing.<sup>51</sup>

The decisions by the First and Ninth Circuit Courts of Appeals are consistent with other recent federal court opinions granting reinsurance arbitration panels, acting under traditional honorable engagement clauses,

wide latitude to fashion remedies, both interim and final;<sup>52</sup> determine the preclusive effect, if any, to give to a prior award or court decision involving one or more similar party;<sup>53</sup> and decide what jurisdiction’s law and procedures, if any, will apply to the proceeding.<sup>54</sup> While most arbitration panel awards remain unchallenged by the parties, the court decisions recognizing the broad grant of authority implicit in honorable engagement clauses significantly impact the arbitration process.

#### **iv. Practical Impact Of The Honorable Engagement Clause On The Arbitration Process**

The differences described above in the interpretation and application of the typical honorable engagement clause by English and U.S. courts have practical implications on the arbitration process and should be thoughtfully considered by practitioners.

##### **A. Arbitrations In England**

The narrowly construed honorable engagement clause and the statutory framework within which it has operated has had an impact upon the way in which arbitrations are conducted and the results of those arbitrations.

One impact of the 1996 Act and the honorable engagement clause has been the “curious development” of arbitration panels rendering compromise decisions which, in some instances, would not withstand legal scrutiny if challenged, but which the parties elect not to appeal.<sup>55</sup> The parties do not challenge the compromise awards because they weigh the chances of an unfavorable court decision and determine that they are better off with the compromise.

The unqualified language of section 46(1)(b) of the 1996 Act also leaves open the question of the arbitrators’ scope of authority under an honorable engagement clause. Arbitrators have the potential to seek the expansive role that was traditionally sought under the more broadly drafted honorable engagement clause. There is reason to believe that the 1996 Act validates the widest possible form of discretion conferred upon arbitrators.<sup>56</sup>

However, parties should be aware that a broadly drafted honorable engagement clause has other potential consequences. As noted above, it may

invalidate the honorable engagement clause or as one court has suggested, perhaps even the entire reinsurance agreement. It might also influence arbitrators to expand their power under section 46(1)(b) and render awards not necessarily based on any principles of law. As a result, parties could find themselves unable to appeal the award on grounds of error of law.<sup>57</sup>

### B. Arbitrations In The United States

Given U.S. courts' limited power of review over arbitral awards and the broad grant of authority found to be implicit in honorable engagement clauses, the practical impact of the clause in U.S. reinsurance arbitrations can be profound. The first issue impacted is the selection of the panel itself, which can be comprised of lawyers or non-lawyers.<sup>58</sup> A treaty containing a traditional honorable engagement clause, relieving the panel from judicial formalities and strict rules of law, may allow for greater consideration of non-lawyers for the positions of arbitrator and umpire, as there is less need for comprehensive understanding of legal precedents and standards.

Secondly, it impacts the framework in which the parties will advance their positions, which in turn often impacts the arguments themselves. A panel operating under a broad honorable engagement clause that frees the panel from applying strict rules of law may give considerably less weight to a choice-of-law clause in the governing treaty. In such a case, the parties and panel may resort to examining "black letter" rules of law, where appropriate, or may seek to apply business and industry custom and practice in their arguments and findings. This occurrence is particularly common where the panel is composed of non-lawyers. Additionally, reinsurance arbitration panels rarely apply strict rules of evidence,<sup>59</sup> but instead frequently reserve the right to evaluate the reliability and relevance of particular documents and testimony in their deliberations.

### V. Conclusion

While the suggested impact that honorable engagement clauses have on the U.S. reinsurance arbitration process may be surprising to practitioners who do not appear regularly in U.S. matters, many who engage in U.S. reinsurance arbitrations frequently find the impact of the clause to be liberating. As noted above, honorable engagement clauses allow parties to ad-

vocate more practical, business-oriented approaches to disputes that might not be available if the law of a particular jurisdiction were stringently applied. In many respects, this freedom to argue industry custom and practice, or to advocate the best business resolution to a dispute, embodies the true purpose behind the honorable engagement clause. That said, a certain comfort may exist in knowing that a panel must abide by a particular set of rules or apply a particular state's law. Where the governing law is clear, having been negotiated by the parties in advance, dispute resolution can be more predictable and efficient, and the risk of an award not based on any rational legal principle is considerably lessened. Obviously on this point, practitioners in both England and the U.S. may disagree. Clearly, what can be agreed upon is that the inclusion of honorable engagement clauses in future agreements, especially in the U.S., should be given careful consideration in light of the impact on the arbitration process.

---

### Endnotes

1. Black's Law Dictionary (1996).
2. Ostrager & Vyskocil, Modern Reinsurance Law & Practice §5.04 (2d ed. 2000).
3. C.E. Golding, A History of Reinsurance with Sidelights on Insurance 81 (2d ed. 1931) (paraphrasing the arbitration clause found in Art. 18 of a reinsurance treaty between La France Compagnie d'Assurances contre l'Incendie, of Paris, and Riunione Adriatica di Sicurta, of Trieste). A full copy of the referenced treaty is attached as Appendix M to Mr. Golding's treatise.
4. Id. at 81.
5. Reinsurance Contract Wording 91 (R. Strain, ed. 1992); see also Home Ins. Co. v. Administratia Asigurarilor de Stat [1983] 2 Lloyd's Rep. 674 (an English case referring to substantially similar honorable engagement language contained in a reinsurance agreement from 1977); Pacific Indem. Co. v. Ins. Co. of North America, 25 F.2d 930, 932 (9th Cir. 1928) (quoting similar language from a 1926 reinsurance agreement).

6. Robert Merkin, Arbitration Law (1991) at ¶ 19.1 (Issue No. 19: 2 December 1997).
7. Orion Compania Espanola De Seguros v. Belfort Maatschappij Voor Algemene Verzekgringeen [1962] 2 Lloyd's Rep. 257, citing Kent v. Elstob (1802) 3 East 18.
8. Robert Merkin, Arbitration Law (1991) at ¶ 19.1 (Issue No. 19: 2 December 1997).
9. Id.
10. Id. at ¶ 19.2 (Issue No. 19: 2 December 1997).
11. Id., citing Halfdan Grieg & Co. A/S v. Sterling Coal & Navigation Corp., The Lysland [1973] 1 QB 296.
12. Orion Compania Espanola De Seguros v. Belfort Maatschappij Voor Algemene Verzekgringeen [1962] 2 Lloyd's Rep. 257, quoting Czarnikow v. Roth, Schmidt & Co. [1922] 2 K.B. 478, 488 (Scrutton L.J.).
13. Robert Merkin, Arbitration Law (1991) at ¶ 1.6.
14. Id. at ¶ 19.4 (Issue No. 19: 2 December 1997).
15. Id.
16. Id. at ¶ 19.5 (Issue No. 33: 1 January 2003), citing Schiffahrtagentur Hamburg Middle East Line GmbH Hamburg v. Virtue Shipping Corp. Monrovia [1981] 1 Lloyd's Rep. 533; FH Rayner (Mincing Lane) Ltd. v. Shaher Trading Co. [1982] 1 Lloyd's Rep. 632; Moran v. Lloyd's [1983] 2 All ER 200; Interbulk Ltd v. Aiden Shipping Co. Ltd. [1983] 2 Lloyd's Rep. 424; Blexen Ltd. v. G Percy Trentham Ltd. [1990] EG 133; and King v. Thomas McKenna Ltd. [1991] 1 All ER 653.
17. The 1996 Act provides at section 52(4) that: "The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons." But see Merkin, Arbitration Law at ¶ 19.10 (citing Bremer Handelsgesellschaft mbH v. Westzucker GmbH (No. 2) [198] 2 Lloyd's Rep. 130, at p. 132, for the proposition that courts had previously expressed the view that arbitrators should give their reasons for an award).
18. Section 69(1) of the 1996 Act provides that: "Unless otherwise agreed by the parties, a party to arbitral proceedings may . . . appeal to the court on a question of law arising out of an award made in the proceedings."
19. The 1996 Act, sections 68 (1) and (2). The grounds for challenging an award listed above are not exhaustive.
20. The 1996 Act, section 1(c).
21. The 1996 Act, section 46(1)(b).
22. XL Ins. Ltd. v. Owens Corning [2000] 2 Lloyd's Rep. 500 (Q.B.).
23. Home & Overseas Ins. Co. Ltd. v. Mentor Ins. Co. (UK) Ltd. [1989] 1 Lloyd's Rep. 473.
24. See Maritime Ins. Co. v. Assecuranz Union von 1865 (1935) 52 LI LR 16 (while not actually ruling on the issue of the validity of the honorable engagement clause, Goddard J. appeared inclined that the entire reinsurance treaty containing such a broadly drafted clause ran the risk of being regarded as a non-binding gentlemen's agreement).
25. Orion Compania Espanola De Seguros v. Belfort Maatschappij Voor Algemene Verzekgringeen [1962] 2 Lloyd's Rep. 257 (where a broadly drafted honorable engagement clause was deemed void because it would have the effect of ousting the statutory supervisory jurisdiction of the English court over arbitrations, and to rule otherwise would mean that the court could not review an arbitral award that was not based upon accepted principles of English law). But see, Eagle Star Ins. Co. Ltd v Yuval Ins. Co. Ltd. [1978] Lloyd's Rep. 357 (C.A.) (The presence of such a broadly drafted clause does not nullify the whole contract or oust the jurisdiction of the courts; rather, it removes the requirements of following technicalities and strict constructions.).
26. See Eagle Star Ins. Co. Ltd v. Yuval Ins. Co. Ltd. [1978] Lloyd's Rep. 357 (C.A.) (holding that a broadly drafted honorable engagement clause

- “does not oust the jurisdiction of the courts. It only ousts technicalities and strict constructions. That is what equity did in the old days. And it is what arbitrators may properly do today under such a clause as this.”); Home Ins. Co. and St. Paul Fire & Marine Ins. Co. v. Adminstratia Asiguraricor de Stat [1983] 2 Lloyd's Rep. 674 (in a similarly worded honorable engagement clause, “[a]ll that was intended was to free the arbitrators to some extent from strict rules and this, on the authority of the Eagle Star case, is permissible”); and Overseas Union Ins. Ltd. v. AA Mutual Int'l Ins. Ltd. (1988) Times, 26 January (the court was of the view that whilst such clauses might entitle the arbitrators to a more lenient approach than the court, “it was doubtful whether they could embark on any other inquiry than what the law required, namely, finding the natural and proper meaning of the words' use in the particular context”).
27. [1989] 3 All ER 74 (C.A.).
  28. [1984] 3 All ER 229 (H.L.) (Diplock L.J.).
  29. In Antaios, the arbitrators were of the view that “a purposive construction should be given to the clause so as not to defeat the commercial purpose of the contract.”
  30. [1984] 3 All ER 229 (H.L.) (Diplock L.J.). But see American Centennial Ins. Co. v. INSCO Ltd. [1996] LRLR 407 (whilst recognizing that a narrowly drafted honorable engagement clause makes it clear that “the parties intend the document to be construed in a way which gives effect to the business realities rather than to the literal meaning of the words used where these conflict,” courts do have the authority to reject the conclusions of arbitrators on matters of construction if it is clear that the words used will not fairly bear the meaning given to them by the arbitrators.).
  31. [1984] 3 All ER 229 (H.L.) (Diplock L.J.).
  32. Due to the dollar values frequently involved and the diversity of the parties, reinsurance disputes are most often heard by federal courts, thereby invoking the Federal Arbitration Act. In the event that a dispute is heard in state court, most states have also codified individual arbitration statutes, the vast majority adopting a version of the Uniform Arbitration Act. See the website for the National Conference of Commissioners on Uniform State Laws at [www.nccusl.org](http://www.nccusl.org) (last visited Feb. 13, 2006).
  33. United States Arbitration Act, 68 P.L. 401, 68 Cong. Ch. 213; 43 Stat. 883 (Feb. 12, 1925).
  34. Certain later sections of the FAA were not included in the original 1947 act, but §§9 and 10, discussed in this article, date back to 1947. Section 10 has been slightly revised over the years.
  35. Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478 (1989).
  36. Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 330 (1st Cir. 2000) (“[A]s long as the arbitrator is ‘even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.’”) (citing United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)).
  37. Id. (citation omitted).
  38. 9 U.S.C. §10. Motions to vacate must be made within three months of the final arbitral award. See 9 U.S.C. §12. Motions to confirm are filed under § 9 and motions to modify or correct an order are made under §11.
  39. The first four standards listed above are found in section 10 of the FAA, while the fifth, manifest disregard of the law, is a judicially created ground for vacating arbitration awards. See, e.g., Brabham v. A.G. Edwards & Sons Inc., 376 F.3d 377 (5th Cir. 2004) (finding that manifest disregard of the law is an accepted nonstatutory ground for vacating arbitration awards).
  40. United States Life Ins. Co. v. Insurance Comm'r of the State of California, No. 05-55588, 2005 U.S. App. LEXIS 25763 (9th Cir. Nov. 28, 2005) (internal citations omitted), amended by, reh'g denied, 2006 U.S. App. LEXIS 601 (9th Cir. Jan. 6, 2006).

41. The District Court decision, now under seal, is U.S. Life Ins. Co. v. Superior Nat'l Ins. Co., et al., No. CV 05-678-GLT (C.D. Cal. Mar. 15, 2005). It was previously published in Mealey's Litigation Report: Reinsurance, Vol. 16, # 2 (May 26, 2005).
42. Challenges to reinsurance arbitration awards brought under Section 10 of the Federal Arbitration Act, 9 U.S.C. §10 (establishing the grounds under which arbitration awards may be vacated), are the most common cases that examine the impact of honorable engagement clauses on the arbitral process.
43. U.S. Life, 2005 U.S. App. LEXIS 25763, at \*7.
44. Id. at \*5-\*6.
45. Id. at \*6 (citations omitted).
46. Id. at \*7.
47. Id. at \*8 (internal citations omitted); Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 202 (2d. Cir. 1998) ("to modify or vacate an [arbitration] award on this ground [(manifest disregard)], a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case"); but cf., Nationwide Mut. Ins. Co. v. Home Ins. Co. 330 F.3d 843, 849 (6th Cir. 2003) (holding that while an honorable engagement clause may permit a panel to abstain from following strict rules of law, including contract interpretation, "it does not give the panel the power to exceed its own jurisdiction."); Garamendi v. California Compensation Ins. Co. et al., No. B177760, 2005 Cal. App. Unpub. LEXIS 11799, at \*3 (Cal. Ct. App. Dec. 21, 2005) (applying California's arbitration law and finding that neither the honorable engagement clause, nor the inherent equity power of arbitrators allowed the arbitrators to fashion an order that violated a party's statutory rights under California law or grant a setoff to a party who had been explicitly enjoined from seeking such setoff by the court).
48. 430 F. 3d 492 (1st Cir. 2005).
49. Id. at 495-96.
50. Id. at 497-98 (the honorable engagement clause read as follows: "The arbitrators shall consider this Contract an honorable engagement rather than merely a legal obligation; they are relieved of all judicial formalities and may abstain from following strict rules of law.").
51. Id. at 498 ("We make this evaluation in light of the contract between the parties, which as we have noted, contemplated broad power in the arbitrator to conduct the arbitral proceedings.").
52. See, e.g., Banco de Seguros del Estado v. Mutual Marine office, Inc., 344 F.3d 255, 261-62 (2d Cir. 2003) (holding that courts have consistently read honorable engagement clauses "generously, consistently finding that arbitrators have wide discretion to order remedies they deem appropriate" and finding that the award of pre-hearing security was within the panel's powers); Certain Underwriters at Lloyd's v. Argonaut Ins. Co., 264 F. Supp. 2d 926, 939 (N.D. Cal. 2003) (holding that the broad grant of authority to the Panel under the honorable engagement clause "implicitly empowered" the panel to "formulate appropriate relief for any dispute submitted to it.") (internal citations omitted); In the Matter of Arbitration between Northwestern Nat'l Ins. Co. and Generali Mexico Compania De Seguros, S.A., 00 Civ. 1135 (NRB), 2000 U.S. Dist. LEXIS 7348 at \*4 (S.D.N.Y. May 26, 2000) (noting that the arbitration clause relieved the Panel of following strict rules of law and that "arbitrators have a general power to award attorneys' fees absent a specific prohibition.").
53. See, e.g., North River Ins. Co. v. Allstate Ins. Co., 866 F. Supp. 123, 129 (S.D.N.Y. 1994) (holding that the honorable engagement clause of the reinsurance contract was broad enough to encompass the power of the panel to decide for itself whether to adopt or reject "strict rules of law" and determine the preclusive effect, if any, of a prior award).
54. See, e.g., In the Matter of Arbitration Between Northwestern Nat'l Ins. Co. v. Generali Mexico Compania De Seguros, S.A., 00 Civ. 1135 (NRB), 2000 U.S. Dist. LEXIS 5586, at \*31-\*32 (S.D.N.Y. Apr. 28, 2000) (holding that a forum

choice provision, examined in light of the honorable engagement clause relieving the panel of all judicial formalities and strict rules of law, does not confine the arbitrators to applying the forum's law); Continental Cas. Co. v. Certain Underwriters at Lloyds, No. C-92-4094 DLG, 1998 U.S. Dist. LEXIS 23547, at \*14-22 (N.D. Cal. Nov. 30, 1998) (holding that the parties intended the language of the treaty's arbitration clause, and particularly the honorable engagement clause within it, to act as "an express no choice of law provision" freeing the arbitrators from the "obligation to apply the substantive or procedural law of any specific jurisdiction" even though the treaty also designated a forum in which the arbitration was to be held); see also, Certain Underwriters at Lloyd's v. BCS Ins. Co., 239 F. Supp. 2d 812, 814 (N.D. Ill. 2003) (analyzing a slightly different honorable engagement clause: "The arbitrators will not be obliged to follow judicial formalities or the rules of evidence except to the extent required by the state law of the site of the arbitration. Further, the arbitrators will interpret this Agreement according to the usual and customary practice of the reinsurance business."). It has been noted that while arbitration clauses used in other disciplines frequently incorporate a specific set of rules of procedures, reinsurance arbitration provisions usually leave that issue up to the panel and parties involved. See Staring, Law of Reinsurance 21-9 (1993).

55. Clive O'Connell, "Learning to Love Arbitration" Insurance Day (19 February 1998).
56. Robert Merkin, Arbitration Law at ¶ 5.56 (Issue No. 28: 1 January 2001).
57. Id. (referring to the Feb. 1996 Report by the Departmental Advisory Committee on Arbitration Law, ¶ 223, for the proposition that the effect of an equity clause is to exclude a right of appeal under section 69 of the 1996 Act).
58. While arbitration clause language varies in this regard, one common formulation requires that the arbitrators and umpire be disinterested current or former officers or directors of insurance or reinsurance companies.
59. See, e.g., the American Arbitration Association's Commercial Arbitration Rules & Mediation Procedures, at R-31, Evidence ("Conformity to legal rules of evidence shall not be necessary."), available at <http://www.adr.org> (last visited Feb. 14, 2006); ARIAS-U.S. Practical Guide to Reinsurance Arbitration Procedure, at Comment E ("The Panel has considerable discretion to limit the amount and type of discovery available to the parties in the arbitration. [ . . . ] No particular pattern suits all reinsurance arbitrations."), available at <http://www.arias-us.org> (last visited Feb. 14, 2006). ■